

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

LEONARD KIRBY, #1104567,

Petitioner,

v.

ACTION NO. 2:24cv540

CHADWICK DOTSON,
Director of the Virginia
Department of Corrections,

Respondent.

FINAL ORDER

Petitioner Leonard Kirby ("Kirby"), a Virginia inmate, filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on September 4, 2024, challenging his convictions in the Circuit Court for Chesterfield County in July 2024. ECF No. 1, at 1; *Commonwealth v. Kirby*, Nos. CR23F00719-01-02, CR23F01274-01, CR23M00720-01-02 (Va. Cir. Ct. Oct. 3, 2024). The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation.

At the time Kirby signed his petition, he was awaiting sentencing on his convictions. ECF No. 1, at 1, 7. On November 7, 2024, the Court entered a show cause order directing Kirby to

show cause why his petition should not be dismissed pursuant to 28 U.S.C. § 2254(b)(1)(A) without prejudice to Kirby refiling his claim in this Court after proceeding in state court. ECF No. 6. Kirby did not respond to the order. A review of the online Virginia courts case information reflects that following sentencing, Kirby appealed his convictions to the Court of Appeals of Virginia on January 8, 2025, and his appeal is pending in that court. See *Virginia Courts Case Information*, <https://eapps.courts.state.va.us/cav-public> (last visited Mar. 4, 2025) (select "ACMS-CAV"; then select "Appellant/Petitioner" and search "Kirby, Leonard"); *Kirby v. Commonwealth*, No. 004425 (Va. Ct. App. Jan. 8, 2025).

The report and recommendation, filed January 15, 2025, recommends that Kirby's federal petition be dismissed without prejudice to Kirby's refiling his federal petition after he has proceeded in the Virginia state courts. ECF No. 7. Each party was advised of the right to file written objections to the findings and recommendation made by the Magistrate Judge. *Id.* at 2-3. No objection has been filed.

The Court, having reviewed the record, does hereby adopt and approve the findings and recommendations set forth in the report and recommendation. The Court, therefore, ORDERS that Kirby's

petition is **DISMISSED WITHOUT PREJUDICE** to allow Kirby to proceed with his claims in state court.

Kirby has failed to demonstrate "a substantial showing of the denial of a constitutional right," and, therefore, the Court declines to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. See *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003).

Kirby is **ADVISED** that because a certificate of appealability is denied by this Court, he may seek a certificate from the United States Court of Appeals for the Fourth Circuit. Fed. R. App. P. 22(b); Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a). If Kirby intends to seek a certificate of appealability from the Fourth Circuit, he must do so within thirty (30) days from the date of this Final Order. Kirby may seek such a certificate by filing a written notice of appeal with the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510.

Service shall be made upon respondent in accordance with the Agreement on Acceptance of Service. A copy of this Final Order shall also be sent to Kirby.

/s/ 

Mark S. Davis
Chief Judge

Mark S. Davis
Chief United States District Judge

Norfolk, Virginia
March 10, 2025